**Arthur Briggs, Inc. *and* Knitgoods Workers' Union, Local 155, I.L.G.W.U., AFL-CIO.** Cases 2-CA-17519, 2-CA-17825, 2-CA-18066, and 2-RC-18849

November 3, 1982

## DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On May 14, 1982, Administrative Law Judge Robert T. Snyder issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel filed a statement in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Arthur Briggs, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(d):

"(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act."

2. Insert the following as paragraph 2(b), and reletter the subsequent paragraphs accordingly:

"(b) Expunge from the records of Paul Lynch any and all written reports, notations, or memoranda reflecting its refusal to reinstate him, or other unlawful discipline against him, and notify him in writing that this has been done and that evidence of this refusal to reinstate him, or of other unlawful discipline, will not be used as a basis for future discipline against him."

3. Substitute the attached notice for that of the Administrative Law Judge.

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT threaten to close our plant if Knitgoods Workers' Union, Local 155, I.L.G.W.U., AFL-CIO, becomes our employees' collective-bargaining representative, and WE WILL NOT keep under surveillance the union and protected concerted activities of our employees.

WE WILL NOT discourage membership in Knitgoods Workers' Union, Local 155, I.L.G.W.U., AFL-CIO, or in any other labor organization, by refusing to reinstate strikers, upon their unconditional request, to existing vacancies with full seniority rights and privileges.

WE WILL NOT refuse to recognize and bargain in good faith with the aforementioned Union as the exclusive bargaining representative of our employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees employed by us at our Bronx, New York facility, excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We do not adopt the Administrative Law Judge's finding that Goldstein was "meek and easily dominated or intimidated" and would credit Goldstein's testimony with respect to Maldonado's strike misconduct without relying on such finding.

We also find it unnecessary to rely, in issuing a bargaining order, on the Administrative Law Judge's finding that the election results were "close."

[2] In adopting the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(1) of the Act by its deliberate surveillance of union leafletting on the day of the election, designed to discourage union activity, and that this surveillance was objectionable conduct that warrants setting the election aside, we also rely on *Woodland Molded Plastics Corp.*, 250 NLRB 169 (1980), and cases cited therein. See, generally, *Cannon Electric Company*, 151 NLRB 1465, 1468–69 (1975).

[3] We find that the nature of Respondent's unfair labor practices warrants the issuance of a broad cease-and-desist order, under the standards set forth in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), and we have modified the Administrative Law Judge's recommended Order and notice accordingly.

We will also order Respondent to expunge from its records any reference to its unlawful refusal to reinstate Paul Lynch, and to any other unlawful discipline against him, and to notify Lynch that it has done so. See *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

exercise of rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL offer Paul Lynch immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of wages which he may have suffered by reason of our discrimination against him, together with interest.

WE WILL expunge from the records of Paul Lynch any and all written reports, notations, or memoranda reflecting our refusal to reinstate him, or other unlawful discipline against him, and WE WILL notify him in writing that this has been done and that evidence of this refusal to reinstate him, or other unlawful discipline, will not be used as a basis for future discipline against him.

WE WILL recognize, effective from the date beginning August 20, 1980, and, upon request, bargain collectively and in good faith with Knitgoods Workers' Union, Local 155, I.L.G.W.U., AFL-CIO, as the exclusive representative of all employees in the appropriate unit described above, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

ARTHUR BRIGGS, INC.

## DECISION

### STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge: These are consolidated cases heard in New York on July 12, 14, and 15, 1981. Upon charges filed by Knitgoods Workers' Union, Local 155, I.L.G.W.U., AFL-CIO, herein called the Union, a consolidated complaint in Cases 2-CA-18519, 2-CA-17825, and 2-CA-18066 was issued on June 29, 1981, alleging that Arthus Briggs, Inc., herein called Respondent, violated Section 8(a)(1) of the Act by threatening employees with plant closure if the Union became its employees' collective-bargaining representative and by keeping under surveillance employees who were engaged in protected concerted activities; violated Section 8(a)(1) and (3) by refusing to reinstate two striking employees upon their unconditional offer to return to work at the conclusion of a strike conducted by certain of its employees against Respondent; and violated Section 8(a)(1) and (5) by refusing and failing to bargain collectively with the Union as the representative of its employees in a unit appropriate for the purposes of collective bargaining; and alleging that these unfair labor practices are so serious and substantial in character as to warrant the issuance of a remedial bargaining order.

Case 2-RC-18849 arises out of a representation election conducted by the Regional Director on May 5, 1981, upon a petition filed by the Union in a unit composed of all full-time and regular part-time production and maintenance employees employed by Respondent at its Bronx, New York, facility. Among 28 employees who voted in the election,[1] 15 voted against the Union, 9 voted for the Union, 2 ballots were void, and 2 ballots were challenged. After the Union filed timely objections to the election, on July 9, 1981, the Regional Director issued a notice of hearing on the objections and an order consolidating cases. Concluding that inasmuch as the unfair labor practice allegations in the outstanding consolidated complaint encompassed the conduct alleged as objectionable, and the issues raised thereby could best be resolved on the basis of record testimony at a hearing, and in order to avoid duplication findings, unnecessary costs, or delay, the Regional Director ordered a hearing be held on the objections and that it be consolidated with the hearing scheduled on the consolidated complaint. In its timely filed answer, Respondent denied the commission of any unfair labor practices alleged.

Upon the entire record, including my observation of the demeanor of the witnesses and after careful consideration of the post-hearing briefs filed by Respondent and the General Counsel, I make the following:

### FINDINGS AND CONCLUSIONS

#### I. THE BUSINESS OF RESPONDENT AND THE STATUS OF THE UNION

Respondent is a New York corporation with an office and place of business located in Bronx, New York, where it is engaged in the manufacture and nonretail sale and distribution of knit goods and related products. In the course and conduct of its business operations, Respondent annually sells and ships from its Bronx, New York, facility goods and materials valued in excess of $50,000 directly to points outside the State of New York. Respondent admits and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. THE ALLEGED UNFAIR LABOR PRACTICES AND OBJECTIONS.

##### A. *The Union's Organizing Drive, Bargaining Demand, and Strike and the Employer's Responses, Including Alleged Unlawful Prepetition Conduct*

In July 1980,[2] Norman Lewis, a union organizer, received a telephone call from employee Paul Lynch. A group of Respondent's employees had met and determined they needed a union. One of them, Lucas Colon, who was Spanish-speaking, asked Lynch to make the call

[1] The tally of ballots listed the approximate number of eligible voters as 42.

[2] All references to dates hereinafter are to 1980, unless otherwise noted.

as he did not speak English well. The day following the call, Lewis met with a small group of employees, at noontime, a block or two from the factory. Present with him were employees Raphael Ramos, Lucas Colon, and Christian Delamos. Another meeting was arranged with the aim of involving more workers. This second meeting, held on July 16, in Crotona Park, two blocks from the plant, was attended by 16 to 18 employees. Lewis explained the benefits of unionization and a dozen or more employees signed union authorization cards. A third meeting was held a week later to which Lewis brought a Spanish interpreter to assist him in communicating with the workers. Additional authorization cards were signed on this occasion. Both Paul Lynch and Antonio Maldonado were among the most active employees on behalf of the Union. Maldonado made home visits to solicit cards among Spanish-speaking employees and Lynch distributed cards to four or five other workers.

By the summer of 1980, Paul Lynch had been employed as a presser by Respondent for over 21 consecutive years, having started in 1959. Arthur Briggs, an elderly man in his late seventies, had operated the same business since 1940, initially as sole proprietor and, since its incorporation in 1956, as president and sole shareholder. Briggs testified as to his knowledge of an interest taken over the years by the Union in organizing his employees. He acknowledged he knew and had seen a union organizer, Willard Aldrich, handing out union pamphlets in front of the factory on a number of occasions in the past, most recently 2 or 3 years before. Briggs also believed that Lynch and Aldrich, both black men, were friends and acknowledged he had seen them talking during the Union's earlier organizing effort. Then, on August 19, Briggs saw Aldrich once again in front of the plant entrance giving out union pamphlets.

According to Lynch, later in the day on August 19, just before quitting time, Briggs called Lynch to the plant office and told him "I see your old friends are back. I had spoken to you and told you my place was too small and I can't afford to have no union." Briggs identified the "friends" as the Union. Briggs also said he was going to close the place if the Union came in. Briggs then pulled out an old clipping containing a list of company names and said he had done work for Lord Jeff and the Union put that company and others on the list out of business.

By August 11 the Union had obtained 22 valid authorization cards among the 36 full-and regular part-time production and maintenance employees,[3] and by August 20 the Union had 23 cards. On August 20 shortly before closing time, Lewis and Aldrich visited Respondent's Bronx facility. They rang a bell and, as they were admitted through the main entrance door into an office area by a young female, Lewis asked for Mr. Briggs. Lewis and Aldrich moved toward the plant floor and were met by Briggs who came toward them. Lewis introduced both himself and Aldrich, identified himself and Aldrich as from the Union, and told Briggs they were there because they represented a majority of his workers, and the Union sought recognition and would like to sit down and talk or he should call Mr. Green, the manager of the Union, and set up an appointment.[4]

According to Lewis, Briggs, became agitated and excited; he said he was not interested in the Union and "if he really knew who we were and he had an opportunity to prevent us from entering his plant, he would have." He said other shops under contract with Local 155 and the I.L.G.W.U. had gone out of business and asked if the Union had gotten jobs for the employees who had lost them. Briggs continued, as far as the people are concerned, if they wanted better conditions they could go elsewhere and get employed. When Lewis responded that they represented a majority of the people and wanted to sit down and discuss wages, hours, and conditions of employment, Briggs responded by saying, "Look, I don't need this," and he pulled out a "for sale sign" and said, "I will put this plant up for sale if the Union comes in." Briggs commented he did not want to hear anything about the Union, and repeated that if the plant would become union he would close the plant and sell it and retire to Florida. He added he did not need the headache.

Aldrich testified that after Lewis had introduced the two of them, and explained their majority status and desire to negotiate, Briggs said he "didn't want to know nothing [sic] about the Union and if he had known that we were from the Union he wouldn't have let us in." Briggs rejected Lewis' offer of a business card and then started talking about how many shops the Union had closed or put out of business, and that he "didn't want no [sic] part of the Union and he was going to sell the place before he would recognize the Union." Briggs then picked up a sign in his office; he said, "This is a for sale sign and I will put it out and retire because I don't need it." Briggs continued, "I am 78 years old, I don't need the business." When Lewis then asked him why he should sell the place just because the Union represented a majority of his people, Briggs replied, "I don't want to recognize the Union."

While Lewis recalled other people being in the plant, he said they were some distance from them and he did not know if any workers overheard the conversation. The meeting ended by Briggs requesting they leave the premises.

The organizers had arranged for the workers to wait after quitting time so they could be informed of the results of the meeting with Briggs. There were 23 or 24 employees waiting up the street some distance from the plant. The organizers explained what had happened when they had made their demand, repeating Briggs' words to them, including his threat to close up the place

[3] Respondent admits both the appropriateness of this unit for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act and that as of August 11 a majority of the emplyees in the unit had designated and selected the Union as their representative for the purposes of collective bargaining.

[4] Respondent admitted the allegations of par. 8 of the complaint that on or about August 20 the Union, orally and in person at Respondent's facility, requested Respondent to recognize it as the exclusive collective-bargaining representative of Respondent's employees in the P and M unit previously described and to bargain collectively with it as the exclusive collective-bargaining representative of said employees with respect to their rates of pay, wages, hours of employment, and other terms and conditions of employment.

and go to Florida, and expressed the view that it was an unfair labor practice to state he wanted to close the place.[5] Lewis spoke to the workers in both English and Spanish and where he had difficulty in communicating with them employee Christian Delamos translated for him. Various workers—among them Lynch and Maldonado—then said they wanted to strike and all of the employees present then voted to go on strike the following morning.

Early the following morning, August 21, 20 to 23 employees arrived outside Respondent's premises; a picket line was formed and the strike commenced. Among other legends on the signs were ones accusing Respondent of being "Unfair to Labor."[6] There were 23 to 25 employees engaged in the strike. Lynch and Maldonado were designated to be in charge of the picketing in Aldrich's absence and took turns starting up the line early in the morning. Maldonado, in particular, remained in front of Respondent's premises on Sundays in addition to the other days, since Briggs was at the premises on weekends.

The picketing continued until sometime in November, and the strike continued until December 15, when the Union notified Respondent it was discontinuing to strike and made an unconditional offer on behalf of the striking employees to return to work.

From August 25 until September 15, Respondent voluntarily closed the factory, although both Briggs and his son-in-law and vice president, David Goldstein, continued to come to the premises every day.

On Sunday, September 7, Maldonado was stationed outside the factory with a picket sign when Briggs emerged from inside the building at or about 11 a.m. carrying a case of soda. According to Maldonado, Briggs asked him to carry it to his station wagon parked around the corner. As the two of them walked along, Briggs brought up the subject of the strike. He said he wanted to speak with Maldonado to straighten out the case, that Maldonado should speak to the guys, his coworkers, and tell them that he did not want the Union because he had to pay a lot of money for the Union, a sum of $72,000 a year, and that he would prefer to close than let the Union in and that he would prefer to close in a couple of months. Maldonado replied that he would try and speak to the guys and tell them this. Maldonado left the case at Briggs' car, went back to get the picket signs, and went home.

On October 10, the Union filed the certification petition in Case 2-RC-18849.

Briggs denied ever talking with Lynch about the Union, and specifically at closing time on August 19, the day before the union officials came to the plant. He also denied uttering any threats to Maldonado on September 7. Briggs was an evasive, obstinate, and contradictory witness whose testimony I find to be essentially unreliable. Briggs testified initially as an adverse party called under section 611(c) of the Federal Rules of Evidence during presentation of the General Counsel's case.

Briggs explained that in over 40 years in business he was aware of quite a few shops that had become unionized and then had failed and gone out of business. Briggs then agreed that it was his belief that the Union was a destructive force in that regard. Shortly afterward Briggs categorically denied he ever had the belief that unions are a destructive force. He then noted that when the organizers had come to the plant he had told Aldrich that in many cases unions have put companies out of business. At one point Briggs acknowledged fear that his own shop could be put out of business by the Union, yet he refused to answer what his state of mind was regarding the Union on August 20 when the organizers visited his shop, stating, "And I do not wish to discuss it," and then claimed he did not understand a question asking essentially the same information. Yet, at the same time, Briggs acknowledged that the union agents made no wage or other economic demands on Respondent during their visit.

Briggs asserted that he told the agents that the did not believe they had a majority of his people, but he did not ask them to show proof, and even if they had he would not have negotiated with the organizers because he did not believe they had the authority to do so and this was the only objection he had at the time and he told them so.

At first Briggs denied that his employees knew as of September that he did not like the idea of a union coming in his shop but immediately was forced to retract that answer when shown his pretrial affidavit taken by a Board agent which contained a sworn statement directly contrary. Further, according to Briggs, only "a few" of his employees went on strike on August 21, which is directly contrary to the substantial weight of the evidence.

In other places in his testimony, Briggs' responses coincided with those of Lewis and Aldrich regarding their August 20 meeting. Thus, Briggs said he was shocked to see the two men and that the female employee who responded to their ring had no business letting them in. Briggs also conceded he may have told the organizers that he did not want a union in his shop. Briggs' evasion and disingenuousness is perhaps best illustrated by the strained construction he placed on the statement about closing the business he made during the meeting. According to Briggs, he told Lewis and Aldrich that it might be better closing before signing rather than go broke and discontinue later after signing. There is not one answer that Briggs gave duirng his testimony both during the General Counsel's and Respondent's cases which supports the view that Briggs at any time seriously entertained the thought of recognizing or dealing with the Union to determine its demands or to legitimately seek to reach an accommodation with the Union. Briggs' answer represents a transposition of the actual feelings he had expressed on that occasion so as to place himself in the best possible light as a fatalist who saw the end result of any negotiation process as a failure for his business. In light of all the other evidence of the conversation present on this record, I cannot credit Briggs' carefully

[5] Lynch, who was present, testified that he could not recall telling union representatives about Briggs' conversation with him the day before.

[6] The complaint does not allege, and the General Counsel disclaimed during the hearing, that the strike was either caused or prolonged by the unfair labor practices which are the subject of this proceeding.

constructed and subtle testimonial response as representing his actual response on the day in question. Both Lewis and Aldrich, neither of whom heard the other testify pursuant to an order of sequestration of witnesses successfully sought by Respondent's counsel, substantially corroborated each other's version of the meeting, and I credit them.

As to his conversation with Maldonado on September 7, Briggs acknowledged that he gave the carton of bottles to Maldonado to carry to his car after Maldonado offered to carry it, but testified that there was no conversation between them during the 5-minute walk because construction work on the street on which the plant abutted affected conditions on the sidewalk, forcing them to proceed in single file with Malonado walking ahead. But those conditions did not foreclose conversation at the outset, or once they had turned the corner or arrived at Briggs' car. Briggs also claimed that he would not speak to Maldonado or ask him to speak to other employees because he, Maldonado, had no authority. Yet, the occasion of Maldonado's presence outside the plant on a Sunday after the strike had commenced and before Briggs had decided to call back the nonstriking employees to work presented a good opportunity for Briggs to seek to persuade a key union adherent while the two were alone to make clear to his coworkers on strike that the plant would close before Briggs would ever agree to increased wages and benefits. As I have found, Briggs had already made the same point with the two organizers on the day of the Union's bargaining demand, but without success. Maldonado's account of the talk was straightforward and to the point and consistent with Briggs' prior conversation with Lewis and Aldrich. I credit Maldonado's account.[7]

With respect to Lynch's account of his conversation with Briggs on August 19, in view of Briggs' admitted frame of mind with respect to the Union's destructive force on companies' economic well being, his admitted statements dwelling on this concern, his statement of regret that the organizers ever gained entrance to speak with him the following day, and his familiarity with Aldrich from past organizing attempts and Lynch's friendship with him, as well as Briggs' general unreliability as a witness, I am prepared to credit lynch that Briggs made the remark which Lynch attributed to him.[8]

Briggs' statements to Lynch on August 19, to Lewis and Aldrich on August 20, and to Maldonado on September 7 each constitute threats of plant closure if the Union succeeded in becoming the employees' bargaining representative, and thus constitute unfair labor practices in violation of Section 8(a)(1) of the Act.

As the General Counsel persuasively argues at page 15 of his brief, none of the economic consequences to which Briggs alluded as attributable to the Union's advent were based on objective considerations. Briggs had no indication at all that the Union would make demands that would cause economic hardship, let alone plant closure. Briggs' immediate reactions to Lewis and Aldrich, as well as the two employees, were irrational and emotional statements whose thrust were retaliatory in nature without any basis in fact.[9] It is also reasonable to conclude that Briggs' comments made to the two union representatives were intended to be related to the employees directly involved.[10] It mirrored the same threat made a day earlier directly to an employee, Paul Lynch, and was made to the individuals who asserted in making the bargaining demand they were representing a majority of Briggs' employees. Those representatives could reasonably infer that Briggs' response to them was not limited to themselves but was meant to be relayed to the employees they purported to represent. It was not necessary or even reasonable for Briggs to have requested that his comments be so relayed for the inference to be drawn by the organizers and I reject Respondent's contrary conclusion at page 29 of its brief.

### B. *Respondent's Conduct During the Critical Period*

As related earlier, the Union's petition was filed on October 10, some 3 weeks after Respondent recalled its nonstriking employees and reopened its plant in mid-September. By December 15, the Union sent a mailgram to Respondent on behalf of its striking employees, offering an immediate and unconditional return to work and an end to the "unfair labor practice" strike. By a two-page letter dated December 18, forwarded to the Union by certified mail, return receipt requested, Respondent responded to the mailgram. It advised the Union that employees Antonio Maldonado and Paul Lynch would not be reinstated to their former positions because they had engaged in picket line misconduct thereby forfeiting their right to return to work. Because of necessary alterations in business operations since the strike, changing from hand-knitting to the utilization of sewing machine operators, Respondent advised that it did not have sufficient work to permit the return of all hand-knitting machine operators, whose future status would have to await business conditions, but agreed to reinstate certain employees immediately.

The status of both Maldonado and Lynch, alleged as discriminatees in the complaint who were denied reinstatement because of their union activities, including participation in the strike, will now be addressed.

During the hearing, Respondent relied upon certain alleged incidents as warranting the two employees' denial of reinstatement. With respect to Lynch, these acts included the following:

[7] Respondent's attack on Maldonado's credibility at p. 30 of its brief, that in his testimony he claimed to have told other employees of Briggs' remarks while in his affidavit he mentions only telling Aldrich about Briggs' threat, is unsuccessful. Maldonado adequately explained that his conversation took place with Aldrich and other employees on the picket line present. Consequently, the distinction Respondent seeks to magnify does not amount to an inconsistency sufficient to impeach Maldonado's testimony. Maldonado also explained that his understanding of English, the language in which his affidavit was taken, is limited, and that consequently in his reading of it before he swore to its contents he was somewhat handicapped. Maldonado testified with the aid of a Spanish-speaking interpreter.

[8] Contrary to the argument at p. 28 of Respondent's brief, Briggs was aware of Aldrich's leafletting on August 19 when he spoke to Lynch about the appearance of Lynch's "friends" from the Union.

[9] See *Patsy Bee, Inc.*, 249 NLB 976 (1980); *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

[10] See *AAA Disposal Systems, Inc.*, 237 NLRB 391 (1978).

On September 18, a few days after Briggs reopened the factory and certain nonstriking employees came back to work, Briggs claimed Lynch threatened him with bodily harm. As explained by Briggs, a female employee, Valerie Rodriquez, coming in to work for the first time after Respondent's reopening, called him from a telephone near the plant and asked him to meet her at the entrance door because she was afraid. When Briggs came out the entrance door, he saw Aldrich with his arm against the wall of the factory, blocking Rodriquez' passageway about 5 feet from the door.[11] As he, Briggs, moved to go to her assistance, Lynch, who was also present, moved between Briggs and Rodriquez, held open his jacket with his hands on both sides of his body, and prevented Briggs from seeing Aldrich and Rodriquez. As Briggs then sought to go around Lynch, toward Rodriquez, and without touching him, Lynch raised a fist and said, "If you touch me I will let you have it." At this point Aldrich withdrew his arm. Briggs reached Rodriquez; Briggs said he would take care of both of them, Lynch and Aldrich,[12] and he escorted Rodriquez into the plant.

Rodriquez also testified. She corroborated her call to Briggs, but stated she asked him to meet her halfway to the entrance from the gas station from which she telephoned which is located next to the plant. However, when she reached the entrance door Briggs had not yet arrived. Meanwhile, Aldrich and Lynch, the only persons picketing there at 7:45 a.m., were talking with her, seeking to persuade her not to cross the picket line or enter the factory. Rodriquez acknowledged that Lynch's entreaties were uttered in a normal conversational tone. When Briggs emerged he told her to go inside and, if she couldn't go inside, to go home and he also came toward her. Contrary to Brigg's account, Rodriquez swore that no one and nothing was blocking the door or Briggs' movement. She did testify that at some point Lynch held his jacket open with his back to her, facing Briggs. According to Rodriquez, a conversation and argument ensued for 15 minutes, yet she could not recall a word of it. Rodriquez herself remained outside this whole time although as she testified she was nervous and afraid and she could have gone inside at any time. At some point Lynch was now yelling and then he raised a hand to Briggs and Aldrich came between Briggs and Lynch. After a few more minutes, Rodriquez went past the three others who were between her and the door and entered the plant. After a few more minutes, Briggs followed her.

Lynch denied threatening to harm Briggs. He testified that on the date in question he saw Rodriquez walking to the plant, and, accompanied by Aldrich, went down the street to meet her so that when they talked with her there could be no claim of blocking the plant. As he was seeking to enlist her support for the strike,[13] Briggs came down to them, about 25 to 30 feet from the entrance, from behind, went around him, took Rodriquez by the arm and told her come on, "let's go to work," and took her into the plant. Lynch denied saying anything to Briggs although he continued talking with Rodriquez while Briggs went around him. He also testified tht Rodriquez seemed to be in fear at the time.

Briggs' and Rodriquez's accounts, as noted, have significant variations. Part of Rodriquez' testimony and even her sense of events may have been colored by the nervousness on the witness stand which she exhibited or even by her fear while outside the plant. Yet, her recollection of the time involved, if correct, supports the conclusion that a substantial argument developed. I am prepared to credit her against Lynch that Lynch and Aldrich had words with Briggs and that, in accordance with Briggs and Rodriquez' versions, at some point Lynch did raise his arm to Briggs.[14] Furthermore, I also find that Lynch spread his jacket while facing Briggs, forcing Briggs out of his way to go around him to reach Rodriquez. In view of Rodriquez' failure to claim that she had been blocked, I do not credit Briggs' testimony in that regard. Nevetheless, Lynch's conduct represents a physical act of a possible threatening nature, the seriousness of which calls for further discussion. Whether it constituted an assault which placed Briggs in imminent danger of bodily harm is far from clear. A later discussion between the two, described and discussed *infra*, clarifies that Briggs' concern for his personal safety was not so serious as to cause him to deny Lynch the opportunity of ever working for him again.[15] That Lynch's attention and anger was directed to Briggs after he came out from the shop, and had never been apparent to Rodriquez before Briggs' appearance, shows that the words between Lynch and Aldrich on the one side, and Briggs on the other, were heated. The exchange, then was taking place on the picket line between a leading union advocate and the employer who had rejected the Union's offer to negotiate and had threatened him with loss of his job and that of all other employees. Nonstriking employees were only just returning to start operations after a month's hiatus. The setting was thus volatile and Lynch's conduct can be explained under the rubric of "animal exuberance" at the situs of the picketing, given all of the surrounding circumstances described.[16] Briggs' hostility to the Union and its adherents had already been brought home to Aldrich and Lynch, personally, a month earlier. Lynch's shielding action may have been an act of bravado, but even Respondent does not rely on it alone as evidencing sufficient misconduct to justify a denial of rein-

[11] As earlier noted, both a portion of the street, Third Avenue, as well as the sidewalk were torn up and obstructed, hindering movement because of the limited unobstructed passageway remaining.

[12] Briggs later obtained a summons against them from the I.M.C.R., a Bronx community dispute resolution organization, and the matter was heard before that group with all parties present. Its mediation efforts resulted in the mutual undertaking not to harass each other.

[13] Among other things, Lynch said he told her not to cross the picket line because a few days before Briggs had fired her, and after firing her had now called her back to work. This earlier firing was not explored on the record, when Briggs and Rodriquez took the stand, during presentation of Respondent's case. During Briggs' earlier sec. 611(c) examination, Lynch had not yet testified.

[14] Footnote missing.

[15] See *N.L.R.B.* v. *Efco Manufacturing, Inc.*, 227 F.2d, 675, 676 (1st Cir. 1955), cert. denied 350 U.S. 1007.

[16] See *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941). See also *Montgomery Ward & Co., Incorporated* v. *N.L.R.B.*, 374 F.2d 606, 608 (10th Cir. 1967).

statement. That Lynch may have reasonably believed, in spite of his testimonial denial of responding with a hostile gesture, that Briggs touched him as he went around him to pull Rodriquez into the shop is also apparent. While provocation may be too strong a word to characterize Briggs' conduct, it is clear that Lynch's physical act was defense, and also was not directed at third parties not involved in the labor dispute. On balance, therefore, I conclude that Lynch's conduct did not rise to the level of a violent act or one sufficiently serious to deny him reinstatement rights under the Act.

Even if Lynch's conduct at the time could be said to have crossed the line from excusable to inexcusable conduct, Briggs' later statement to him was both an act of condonation and a recognition of the fact that Lynch's gesture had not been taken as an act of violence against his person. Lynch testified that sometime in later September, a couple of weeks after the plant had reopened,[17] Briggs was standing at the plant entrance door between 4:30 and 5 p.m. As Lynch walked by him on the picket line that was circling in front of the plant, Briggs said to him, "Paul, if you want to come back to work you know what you have to do, you have to get rid of the Union."[18]

According to Lynch, there were 15 or so other pickets patrolling at the time, but none of them heard Briggs' remarks which were directed only to him. The pickets were walking behind each other in single file and Lynch stopped, and got out of the line as Briggs spoke to him, then got back into the line without replying and Briggs went back inside. As earlier noted, Briggs testified that he never spoke to Lynch about the subject of a Union. But, significantly, Briggs was not asked by Respondent's counsel, and, accordingly, never responded as to whether he had this particular conversation with Lynch. Based upon my earlier credibility resolution rejecting Briggs' denials of the threats of plant closing to which Lynch, Maldonado, Lewis, and Aldrich uniformly testified, I credit Lynch here, whose testimony in this regard was consistent and had the ring of truth about it on both direct and cross-examination. I conclude that with respect to the arm raising incident, as well as certain other incidents which Respondent asserts removed Lynch's protection under the Act, all of which appear to have preceded Briggs' offer to Lynch to return to work, Respondent excused and condoned Lynch's picket line and related conduct,[19] even assuming it exceeded lawful bounds. Such condonation is consistent both with Briggs' antiunion hostility and the way in which Respondent probably perceived Lynch's behavior generally, which did not seriously endanger life or property or even reasonably tend to coerce or intimidate employees. Based upon Briggs' more than 20-year association with Lynch as an employee, such an inference is imminently reasonable.

Briggs also claimed that Lynch threatened to cut the breasts off women employees trying to come into the factory on September 17, the day before Lynch threatened him. He acknowledged he had been told this by Goldstein. According to Goldstein, he was in the process of escorting women employees out of the factory when Lynch made the alleged remarks. Four women were being escorted. Goldstein was in the lead. Immediately behind him were two women who spoke Italian only. Behind them were two others, including Valerie Rodriquez. Goldstein had opened the front door to leave the plant and the two women of Italian origin were inside the door behind him. In English in normal, conversational tone Lynch said, "You ladies are going to have your tits cut off." According to Goldstein the women did not understand English, and made no reaction to the remark. There is even some question whether they heard Lynch at all. Rodriquez, among the group of four women, did not testify to the alleged threat. Lynch denied it. I conclude that Lynch probably made the remark. However, since it was either not heard or not understood by the employees to whom it was addressed, and had no effect upon them, it appears to have been a form of bantering, albeit with hostile overtones, which ceased during the remaining 2 months of picketing, and, finally, it was condoned by Briggs, to whom it was reported, in his picket line statement to Lynch at the end of the month, I conclude that the incident cannot support Respondent's claim of serious picket line misconduct.[20]

Briggs also claimed that Lynch harassed his son-in-law Goldstein and followed employees, in particular a presser, Sammy Ngozi, who was escorted home by Goldstein, using foul language and making racial slurs to Ngozi, and following them in his car for about a week after the plant reopened just past mid-September.[21] Ngozi, a young black man, had worked for Respondent in the past as a presser, along with Lynch. He had quit to pursue his education, but had also been driving a cab. Around May he contacted Briggs to return and was called back to work after the strike started in August. According to Goldstein, Lynch came over and accompanied Goldstein and Ngozi for two blocks as they walked to Goldstein's car. Lynch hollered at Ngozi and Goldstein kept Ngozi from responding. Goldstein recalled that, among other remarks Lynch made, he asked Ngozi, "Are you afraid of this white man because you're from Africa? You can make more money on strike than you can working." On another occasion Lynch told Ngozi, "We hang scabs."

According to Ngozi, Lynch approached him several times on the street as Goldstein escorted him to be driven home after work, once saying, "You're a black

[17] Lynch was firm in his recollection of the date of this conversation on both direct and cross-examination, recalling on cross-examination that it occurred after he had been away from the picket line for a few weeks in the afternoon at the time of closing.

[18] This statement is not alleged as an unfair labor practice in the complaint.

[19] *Philadelphia Ambulance Service, Inc.*, 238 NLRB 1070, 1075 (1978); *The Colonial Press, Inc.*, 207 NLRB 673 (1973).

[20] Just as with respect to the picketing employee's threat to kill a nonstriking supervisor entering the plant in *N.L.R.B.* v. *Hartmann Luggage Company*, 453 F.2d 178 (6th Cir. 1971), Lynch's comments were not intended literally, should be regarded as picket line rhetoric, and were apparently so considered by Briggs. *Id.* at 185.

[21] On the first day the plant reopened, tires on the car Ngozi had driven to work and parked across the street from the factory, along with those of Briggs and Goldstein, had been punctured. The responsiblity for these acts was never fixed although Respondent believed they were done by the pickets.

man and you have no business working for a white man" and another time saying, "We are on strike, you have no business working for Mr. Briggs" and calling him a "bitch."

Ngozi testified he was told by Goldstein not to talk to Lynch and he did not. He and Lynch had been friendly in the past, they had worked closely together for a 2-year period, and he was aware that Lynch was associated with a church and sometimes read the bible at lunchtime.[22]

It was Ngozi's belief that he was being "harrassed" by Lynch being approached every day after work as he walked with Goldstein, having a finger pointed at him, and coming close to him and cursing him, although he testified to only one curse word used. Ngozi also recognized that Lynch's approach to him was motivated by a desire to have him join the Union and the strike. The other "harassment" Ngozi suffered was being given some union literature by another employee.

Although claiming Lynch followed Goldstein's car "most of the time," he was only able to testify to one time, at the end of his first workday, September 15, that Lynch got in his car and followed Goldstein's car as Ngozi was being driven home.[23] After about a half hour on the expressway, they were able to lose Lynch in the traffic.

Ngozi was not a creditable witness. His exaggerations about the nature of Lynch's conduct toward him, as well as his feigned ignorance about whether he was being paid for the day of his trial appearance and his lack of candor about how he had traveled to the hearing, implying he had come on his own when in fact both he and Valerie Rodriquez had been driven by Briggs, convinces me that, although Lynch approached him over a week's period or longer in an attempt to convince him to cease crossing the picket line or working as a strike replacement, his conduct toward Ngozi was neither racist nor intimidating but rather designed to appeal to his racial pride and solidarity with the striking workers. Lynch's efforts were frustrated by the protective shield placed around him by Goldstein. The following of Goldstein's car appears as one further attempt to reach Ngozi, a person with whom he had worked closely in the past, away from Goldstein's protective custody, to convince him to cease his undermining of the effectiveness of the strike. Contrary to the facts in both *Associated Grocers of New England, Inc.* v. *N.L.R.B.*, 562 F.2d 1333 (1st Cir. 1977), and *N.L.R.B.* v. *Otsego Ski Club—Hidden Valley, Inc.*, 542 F.2d 18 (6th Cir. 1976), cited by Respondent at pages 12 and 13 of its brief, Lynch did not follow Goldstein's car on a lonely road, for a lengthy period, or for a series of successive days, and did not block his car, and his conduct cannot be said to have met an objective standard of tending to intimidate, given Ngozi's refusal to respond to Lynch, their past close working relationship, and Ngozi's understanding that Lynch's approaches to him were motivated by a desire to convince him to honor the line, not to intimidate.[24] I conclude that none of Lynch's conduct toward Ngozi was of a serious nature and should not disqualify him from reinstatement, even apart from Briggs' later condonation of it.

Goldstein testified that on one of the early days of the strike, as he was walking to his car outside the plant, Lynch told him, if he did not sign up with the Union, he would end up in the hospital. Lynch denied the statement. I find it plausible that Lynch, under the emotional stress of the strike and picketing, Briggs' rejection of collective bargaining, and threats to close and Respondent's success in reopening its operation with nonstrikers, would have made the threat attributed to him by Goldstein.[25] But I also find that Briggs was aware of this threat and overlooked it and condoned it when he offered Lynch the opportunity to return to work without the Union at the end of the month.[26]

Respondent also refused to reinstate Antonio Maldonado because of alleged picket line misconduct. Maldonado worked for Respondent from January 5, 1978, until the strike started on August 21, 1980. Maldonado's September 7 conversation with Briggs has previously been described and discussed. According to Goldstein, Maldonado vandalized the locks to the plant entrance door and one other door by jamming them the evening of the day, September 15, that Respondent reopened the plant, and then did it again the next evening.[27]

Goldstein testified that early in the morning of September 15, the day that Sammy Ngozi had come into the plant at 6 a.m. as the first worker on Respondent's reopening of its operations after August 25, Aldrich had banged on the entrance door and told him not to work that day, that he could not control what would happen. Later in the morning through a plant window both Goldstein and Briggs saw Maldonado at different times looking into the plant from a rear lot.[28] Maldonado told Briggs through an opened window, "Now you're going to have a lot of trouble." Maldonado denied this remark. Aldrich was never recalled by the General Counsel to deny Goldstein's testimony. I find that the Union and its most loyal adherents were disturbed by Respondent's attempt to resume operations and were prepared to go to some length to try to change Briggs' determinations to open the factory in mid-September. Consistent with my discrediting Maldonado with respect to the lock tampering incident the evening of September 15, see *infra*, I

[22] Since 1970, Lynch has been a deacon of his Pentecost Church.

[23] Goldstein corroborated that the car-following incident occurred only once early in the strike.

[24] *Advance Pattern and Machine Corporation, d/b/a Gibraltar Sprocket Co.*, 241 NLRB 501 (1979).

[25] In all of his lengthy employment history with Respondent only once had Lynch been involved in a violent incident—a fight with a relative in the dressing room with knives—and the matter had been forgotten and did not result in any reprimand or warning.

[26] Briggs' contemporaneous log of the strike to which he referred while on the witness stand showed he was told of the incident on September 26. Goldstein placed it during an early strike day. I credit Goldstein that the conversation took place shortly after Respondent reopened the plant, well before September 26.

[27] Goldstein had the damage repaired by having the main entrance lock replaced and then repaired late in the evening on September 15 and 16, respectively. If he had not, the plant would have been effectively closed and unable to operate on September 16 and 17 until the repairs could have been made.

[28] That morning Ngozi also saw Lynch looking into his work area from a window also in the rear lot.

conclude that Maldonado did make the comment attributed to him.

As Goldstein related it, following the tire punctures during the day on September 15, Goldstein had driven his son's car back to a location a few blocks from the plant. The tires on his father-in-law's car had been repaired during the day, and it was parked across the street from the plant so when he and Briggs left the plant at a little before 5 p.m. Briggs drove him to his son's car. As they left, some pickets were sitting across the street from the plant near Briggs' car. Maldonado came over to them, made a hand gesture like a wave goodby, and Goldstein told him to "go fuck" himself. Briggs dropped off Goldstein, who got in the car and doubled back to the plant. As Goldstein pulled into the curb across the street from the factory, he observed Maldonado walking in the same direction on the sidewalk near the plant building and receiving a hammer from a man whom he recognized as a worker for a nearby firm on the street. Maldonado went immediately to the middle door of the plant, bent down and hammered away at the lock, then went to the main entrance door and did the same thing. His left hand was up near the lock while he hammered. Meanwhile Goldstein watched from his car and did nothing. At this point Maldonado straightened up, turned, and noticed Goldstein; their eyes met, and Maldonado now went up the block in a fast walk pointing at both Goldstein and Aldrich whom Goldstein now noticed on the sidewalk across the street about 50 feet from Maldonado and walking toward him. As Maldonado got abreast of Aldrich, Goldstein opened the window fully on the driver's side, smiled at both of them, and drove away.

After discussing the matter with his father-in-law by telephone, Goldstein later returned to the factory entrance with his son, arriving at between 6:30 and 7 p.m. Unlike the situation on all previous evenings since the strike started,[29] there were no pickets present. The locks on the two doors which had been tampered with would not take the keys and Goldstein observed some foreign substance in the key holes. His son removed something from the middle door lock with a pen knife or other implement. However, that door as well as a third not tampered with were always bolted from the inside and were never used to enter the plant. After determining that he could not gain entrance to the building, Goldstein left, consulted with Briggs, and arranged to meet a locksmith at the premises later that evening. Goldstein met a locksmith outside the factory at 10 p.m. The locksmith drilled the lock open on the main entrance door, and replaced the cylinder, thereby ensuring access to the plant for the following day. The locksmith informed him it looked like nails had been hammered into the cylinders to jam them. The same evening, Goldstein filed criminal charges against Maldonado, who was arrested the following morning outside the plant.[30]

On the evening of the day of Maldonado's arrest, September 16, Goldstein received a telephone call from a Holmes Company which monitored a burglar alarm system installed at the plant that the alarm had been activated and they were also contacting the police. Goldstein went to the plant and discovered that the telephone line running from a street telephone pole to the factory had been cut and the lock on the main entrance door had been jammed again. Again, Goldstein arranged for the same locksmith to come. This time, the locksmith was able to remove the foreign substance from the cylinder and was not required to replace it.

Besides Goldstein filing the criminal charges against Maldonado, Respondent filed an unfair labor practice against the Union, which resulted in the issuance of a complaint in Case 2-CB-8504 alleging, *inter alia*, that, on or about August 17, the Union, by Aldrich, threatened employees with physical harm because they had crossed or attempted to cross the Union's picket line, and, on about September 15, the Union, by Maldonado, in the course and conduct of the picket line, inflicted damage to Briggs' property. Both acts were alleged as violations of Section 8(b)(1)(A) of the Act. Subsequently, on December 23, 1980,[31] the parties entered into an informal settlement agreement in this proceeding, which was approved by the Regional Director on January 7, 1981. Among other undertakings, the Union agreed not to inflict damage to the property of Arthur Briggs, Inc.

Respondent also alleges that Maldonado threatened certain employees with physical harm on the first Saturday of the strike, August 23, 1980. Jose William Rodriquez testified that he and his brother, Pasqual Diaz Rodriquez, on occasion worked as homeworkers for Respondent. They picked up material, knitted on a machine they maintained in their house, and returned the finished work to the plant.[32] On Saturday, August 23, Jose William came with his brother to the plant in a car driven by a third person at or about 11 a.m. Maldonado saw them and called over Jose William. Maldonado spoke in Spanish. He told him he could not enter or take anything out because they were on strike. When Jose William responded that he had to have work because he needed the work to pay for his rent and food, Maldonado said he could leave the merchandise and get the check but he could not take anything out. Jose William told Maldonado he was going to bring the work. Maldonado said, "If you do, its dangerous for you." Jose William said, "Even under bad circumstances I will take it because I do what I have to do." The Rodriquez brothers then entered the factory and brought in their finished work. They made a number of trips in and out of the factory. Apparently, during one of them, or just before they left after about an hour, Maldonado also told Jose William that, if he

[29] Two employees had been present with picket signs on each prior evening since the strike commenced on August 21.

[30] Maldonado, ultimately tried on the criminal charge of malicious mischief in the Bronx criminal court, was acquitted after a jury trial in which Goldstein testified against Maldonado.

[31] The record does not contain the agreement. Respondent did not offer any testimony nor make the argument that the agreement was unilateral, with the Union Respondent only, and that the Employer Charging Party did not join in it. Since such evidence would tend to support its argument, discussed *infra*, that Respondent was justified in relying on the complaint in refusing to reinstate Maldonado, I infer that the agreement was a bilateral one in which the Employer joined.

[32] These homeworkers were excluded from the appropriate unit stipulated by the parties and did not participate in the election.

took work, someone would follow him and something could happen to him, and also told him, "You have to be on our side." At this time, Aldrich was also present. Jose William responded, "No," he had to work, the Union would not pay his expenses. Jose William understood by Maldonado's remark that something bad could happen to him. The friend who drove them also expressed fear that his car could be damaged.

While at the plant, the brothers informed Goldstein and Briggs of Maldonado's words with them, and Respondent's officials contacted the police and asked Jose William to wait and tell the police what Maldonado had said. Jose William said he did not want trouble, or any problems with either the owners or strikers, he did not take any goods, and he and his brother left without informing Goldstein or Briggs and without waiting for the police. They were not approached by Maldonado or any other picket as they went to the parked car to leave. At the corner, Jose William stopped to telephone the plant and inform Goldstein they would not wait or take any goods. Thereafter, Jose William waited a month and then came to the plant at night to continue his pickups and deliveries of homework.

While Goldstein exaggerated the alleged threats by Maldonado to which Jose William Rodriquez testified, claiming the Rodriquez brothers were threatened with being cut up or killed,[33] I credit Jose William Rodriquez' testimony. He was restrained and consistent on direct in the face of a vigorous cross-examination. He came across as a very believable witness whose recollection was good and whose responses were direct and straightforward, without imbellishment.

With respect to the alleged tampering with the locks to Respondent's premises, I credit Goldstein's testimony of the incident on the evening of September 15 over Maldonado's denial.

Both Maldonado and Aldrich described in some detail their movements in the vicinity of the picket line late in the afternoon of September 15 just prior to and at the time that Goldstein, accompanied by Briggs, first left the plant at the end of the workday. Both asserted that, as Goldstein left in his car, Maldonado moved to Aldrich who was walking up toward the plant after having purchased a snack a few blocks away, and exclaimed, "There goes Dave, let's go home." Both claimed they were the last pickets present and they then left the premises in opposite directions. Aldrich swore that he did not see Maldonado with a hammer or nails at any time during the picketing. One can only speculate about the inference the General Counsel sought to have drawn from the depiction of events at the time Goldstein left the plant. The time was at least 10 to 15 minutes before Goldstein alleged he returned to the plant alone in his son's car. Neither Maldonado nor Aldrich addressed the question of Goldstein's return to the plant rather than his leaving. Either could have been recalled on rebuttal after Goldstein's testimony had been given on Respondent's case-in-chief to respond to Goldstein's story. I conclude that Maldonado's and Aldrich's testimony on this matter was unsatisfactory and did not come to grips with the eyewitness account Goldstein provided. Their accounts apparently were sufficient to influence the jury in Maldonado's criminal trial to conclude that the prosecutor there had failed to sustain the people's burden of proving that Maldonado committed the lock tampering beyond a reasonable doubt. Those accounts, however, are insufficient to overcome the preponderance of evidence which Respondent offered through Goldstein's presentation.[34] Goldstein's testimony was detailed, lacked exaggeration, and was entirely believable. I cannot conceive that Goldstein fabricated his lengthy narrative.[35] The fact of the damage itself was corroborated by the locksmith's paid receipts. The nature of and opportunity for the mischief of which Maldonado is accused is apparent on this record, and Goldstein's decision to return to the plant to check things out after the unsettling events of the first day of renewed operations after the strike was logical and reasonable. I conclude that Maldonado did engage, at least, in the September 15 act of vandalism and damage to Respondent's property with which he has been charged, and that this reprehensible action, committed off the picket line, was a calculated attempt to achieve through unlawful means that which the Union was unsuccessful in achieving through its protected primary strike and picketing, and justifies Respondent's decision to deny Maldonado reinstatement to his former position.[36] Based upon my finding that Maldonado threatened Jose William Rodriquez, the homeworker, with bodily harm, I also conclude that by this misconduct, upon which Respondent also relied, Maldonado forfeited his right to reinstatement at the conclusion of the strike.[37]

In view of this determination, I deem it unnecessary to rule upon Respondent's argument made at pages 16 to 20 of its brief that it was entitled to rely upon the complaint allegation charging the Union with restraining employee Section 7 rights by Maldonado's infliction of damage to its property when it determined to reject his offer to return to work.[38]

[33] Maldonado denied threatening to kill Jose William after Briggs had testified for the General Counsel under Sec. 611(c), but was not recalled on rebuttal to deny Jose William Rodriquez' first-hand testimony of the incident after Respondent rested.

[34] The law is clear that a judgment of acquittal concludes no issue of civil liability in favor of the acquitted defendant. *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485 (1950). Furthermore, collateral estoppel effect cannot be given the criminal case acquittal in this proceeding. See *Williams* v. *Cambridge Mutual Fire Insurance Company, et al.*, 230 F.2d 293 (5th Cir. 1956).

[35] The General Counsel points to the alleged inconsistency of Goldstein's anger at Maldonado and the Union, as manifested in his obscene remark to Maldonado as he left the plant, with his extreme restraint on witnessing the damage to his property some 10 to 15 minutes later, when he failed to try to stop Maldonado's destruction, as evidencing Goldstein's lack of credibility. I do not view these responses as being inconsistent. Goldstein was disturbed by the events of the day, and took the occasion of Maldonado's flippant gesture to respond instinctively with an obscenity. His later conduct, limiting himself to a role as observer, was entirely consistent with the nature of the personality which came across during his testimony, best described as meek and easily dominated or intimidated, as he surely was by his father-in-law.

[36] See, e.g., *Kayser-Roth Hosiery Company, Inc.* v. *N.L.R.B.*, 447 F.2d 396 (6th Cir. 1971).

[37] See *N.L.R.B.* v. *Moore Business Forms, Inc.*, 574 F.2d 835 (5th Cir. 1978).

[38] If I had made such ruling I would have concluded that the settlement agreement did not adjudicate the facts relating to the complaint al-

*Continued*

Christian Delamose, an early union supporter among the employees, testified to two incidents occurring during the critical period, one an alleged threat and the other an alleged surveillance of employee concerted activities on the morning of the May 5, 1981, election.

As to the threat, Delamos testified that after his return to work following the strike, about a month to 3 weeks before the representation election, after being out sick for about a week, Briggs approached him while he was alone at his work place at or about 7:15 a.m. Briggs called him over to an area near a power machine and showed him an NLRB pamphlet printed on blue paper providing information for voters in Labor Board elections. Briggs told him there was a company on Park Avenue which closed down because of the Union, and that one of the organizers was Willie (Aldrich) and there was a worker there who lost his job and was out of work for 3 years and finally had to go on welfare.[39] From time to time, Briggs utilized Delamos' services as an interpreter to translate his statements from English to Spanish for the benefit of Spanish-speaking employees with whom he was attempting to communicate by telephone.

Briggs denied making the statement or any other about the Union to employees. He did acknowledge giving out copies of the NLRB pamphlets to all of those employees who accepted them but did not recall whether he gave one to Delamos. Goldstein, during his cross-examination, admitted familiarity with one shop located on Park Avenue in the Bronx, called La Salle Knitting Mills, which had closed about 3 years ago after having been organized by Aldrige for the Union, and that it was "very possible" he discussed that situation with his father-in-law after the Union's demand and also "possible" that Briggs had voiced sentiments about it to him. Respondent urges that because Delamos was not clear about the date of the conversation, indicating after the General Counsel referred to a particular date that it could have taken place on April 9, and because in his affidavit, introduced in evidence, he had separated the time of Briggs' alleged threat from an approach by Briggs a week later when he was given the pamphlet,[40] Delamos' credibility is doubtful. I disagree.

Delamos was clear in unprompted testimony about the timing of the conversation in relation to the election, placing it on or about the April 9 date alleged in the complaint. I find the testimonial combination of the two conversations to contain a minor variation which does not detract from the essential veracity of Delamos' testimony. It was natural for Briggs to believe that Delamos, a striker and early supporter of the Union and his communicator with Spanish-speaking workers, would be an excellent conduit for spreading his appeal through fear to other employees. I credit Delamos.

Delamos also testified that, as he came to work early on the morning of the election, Willard Aldrich was standing on the sidewalk outside the plant entrance handing out union literature to employees entering the plant. He also saw Goldstein seated in his car parked at the curb in front of the factory entrance. According to Aldrich, as he was standing outside the plant talking to employees as they went into work, Goldstein came out of the plant at or about 7:15 a.m., got into his car parked about 5 feet away, watched Aldrich talk to employees, remained there about an hour to an hour and a half, and then went back inside the plant. According to Aldrich, during the time Goldstein remained seated in his car, the workers arriving for work did not say anything to Aldrich and just passed him right by.

Goldstein admitted that he went outside and sat in his car as General Counsel's witnesses asserted, only for 20 minutes, but that he did it because his father-in-law had reported to him that early that day a female employee had reported that, as she was leaving the plant the prior Saturday, Aldrich had forced her hand open, placed literature in it, and then squeezed her hand closed. It suddenly occurred to Goldstein that Aldrich might be harassing the employees "all over again" so he took a newspaper and went outside. It was Goldstein's belief that his presence there would prevent any harassment of employees. On cross-examination, Goldstein admitted glancing up from time to time to watch as employees approached Aldrich at the plant entrance. Goldstein also had not attempted to verify the employee's story with her before putting his preventive plan into action. That employee was also still employed during the hearing and yet was not called to verify the story Respondent presented.

I find Respondent's motive for engaging in the conduct insufficient and suspect, particularly when weighed against employee rights to be free from employer coercion in exercising Section 7 rights on the eve of a representation election. The test to be applied to conduct to determine whether it violates Section 8(a)(1) of the Act—whether it reasonably tends to interfere with rights protected by the Act—has been clearly met here. Goldstein could have easily and probably surreptitiously arranged to observe from inside the plant or to have received reports on Aldrich's conduct in leafletting, without engaging in the unprecedented and totally inhibiting observation from a vantage point within feet of the employees and clearly within their sight lines as they approached the plant entrance.[41] I find that Respondent had no legitimate purpose in stationing its vice president as it did, that such conduct reasonably tended to inhibit employees in the exercise of their right to converse with the union agent and to distribute and receive union lit-

legation, and that Respondent consented to the settlement. Thus, collateral estoppel did not apply. See *N.L.R.B.* v. *Markle Mfg. Co. of San Antonio*, 623 F.2d 1122 (5th Cir. 1980). There was thus no final order upon which Respondent could be said to have relied in rejecting Maldonado's offer. In the absence of such an order, the burden of proof did not shift to the General Counsel to establish Maldonado's right to reinstatement by virtue of the Board's taking of seemingly inconsistent positions on issuance of the two complaints. *Id.* at 1127. In any event, Respondent proved its defense to the allegation in the instant complaint with respect to its failure to reinstate Maldonado by a strong preponderance of the evidence.

[39] Another time, according to Delamos, Briggs called him over by the bulletin board, referred to the writings there, and said, "You know the Union can't give you all this."

[40] In his affidavit, Delamos asserted that, after giving him the pamphlet, Briggs said, "Now is the time to correct what you did wrong before," and added he was not supposed to talk to Delamos about the Union.

[41] See *Southern Moldings, Inc.*, 255 NLRB 839 (1981).

erature, and that, thereby, Respondent engaged in unlawful surveillance in violation of Section 8(a)(1) of the Act.[42]

### C. *Conclusion as to the Objections*

For purposes of evaluating the Petitioner's timely filed objections, only conduct occurring between the filing of the petition and the election may be considered as a basis for setting aside the election,[43] although prepetition conduct may be considered insofar as it lends meaning and dimension to postpetition conduct or assists in its evaluation.[44]

During the critical period, as previously found, Respondent refused to reinstate employee Paul Lynch in violation of Section 8(a)(3) and (1) of the Act, threatened employee Christian Delamos, and through him, all other employees, with a plant closing and loss of employment in violation of Section 8(a)(1) of the Act, and, by its Vice President David Goldstein, engaged in surveillance of its employees' protected concerted activities the very morning of the day the election was held, also in violation of Section 8(a)(1).

Lynch's discharge brought home to employees the disastrous consequences of forthright and militant union advocacy, even for an employee with the loyal and extraordinarily lengthy attachment to Respondent's business which Lynch had achieved.[45] The threat to Delamos was particularly significant.[46] It was made to one of the employees who had been reinstated after the conclusion of the strike, and thus was designed to make clear the power and control Briggs wielded over the employees' continued livelihood. Delamos was already aware from the union meeting which had immediately preceded the calling of the strike that Briggs was adamantly opposed to union recognition and would take any action within his power to forestall a union relationship, regardless of its demands. Respondent's April 9 threat was not an isolated incident, but a renewal, at a critical time, just weeks before the election, of a consistent pattern of coercive responses to the Union's presence.[47] It was also expressed knowingly to the one employee who was in a position to see that it received the widest circulation among the employees, particularly those of Spanish ancestry who had made up a significant portion of the Union's card majority.[48]

Goldstein's surveillance, coming as it did on the very eve of the election, had to have the most serious negative impact upon the free expression of union sentiment among the employees as they entered the workplace that critical day.[49]

The relative closeness of the ultimate vote lends weight to the conclusiion that Respondent's series of unfair labor practices had a telling effect upon the free and untrammeled exercise of the ballot by Respondent's work force. By virtue of the severity of the violations, the extent of their dissemination, and the small size of the unit, among other relevant factors,[50] I conclude that Respondent's pattern of unfair labor practices, set in true perspective by its prepetition conduct, affected the results of the election. Accordingly, I shall recommend to the Board that the election be set aside.

### D. *The Alleged Refusal To Bargain and Requested Bargaining and Other Remedies*

It remains to consider the complaint allegations that Respondent has refused to bargain in violation of Section 8(a)(5) and (1) of the Act and that such conduct warrants the issuance of a bargaining order.

All of the essential predicates to a finding of refusal to bargain are present here. The Union made demand in an appropriate unit, and at the time it did so, on August 20, 1980, it represented a substantial uncoerced majority of the unit employees. In accordance with the credited testimony Respondent never questioned the Union's majority status, but instead immediately took steps to undermine its status by a series of threats of plant closing which the Board has identified as "one of the most flagrant means by which an employer can hope to dissuade employees from selecting a bargaining representative."[51] The courts as well have long identified such conduct as among the most serious forms of interference with the free exercise of employee rights.[52] As the Supreme Court has taken note, threats to close an employer's operations are among the most effective unfair labor practices "to destroy election conditions for a longer period of time than others."[53]

Respondent, by Briggs, commenced its campaign of threats even before the Union's demand was made, made the threats to the three known leaders among the union adherents in its work force, exhibited the will to carry out the objective of separating from the work force the one among its employees who consistently sought to achieve the Union's recognitional purpose, and, finally, through its vice president, closely observed their association with the union organizer on the very day scheduled for the employees to register their union choice by a secret ballot. Sufficient grounds existing for setting the election aside—a necessary predicate for the remedy

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[42] See *Chemtronics, Inc.*, 236 NLRB 178, 180 (1978); *Harvey's Wagon Wheel, Inc. d/b/a Harvey's Resort Hotel & Harvey's Inn*, 236 NLRB 1670, 1681 (1978).

[43] *The Ideal Electric and Manufacturing Company*, 134 NLRB 1275, 1278 (1961).

[44] *Evans Brothers Barber & Beauty Salons, Inc.*, 256 NLRB 121 (1981); *Dresser Industries, Inc.*, 231 NLRB 591 (1977).

[45] See, e.g., *Apple Tree Chevrolet, Inc.*, 237 NLRB 867 (1978). See also *General Stencils, Inc.*, 195 NLRB 1109 (1972).

[46] Where the threat is made, as here, by the president and sole owner of the corporate respondent at a time close to the election and to an employee who can be expected to repeat it to his fellows, it takes on added weight. See *Sol Henkind, an Individual d/b/a Greenpark Care Center, etc.*, 236 NLRB 683 (1978).

[47] See *Evans Brothers, supra.*

[48] The extent of dissemination of a threat made to a single employee is a significant factor considered by the Board in weighing the impact of the conduct on the electorate. *Super Thrift Markets, Inc. t/a Enola Super Thrift*, 233 NLRB 409 (1977).

[49] See *Dresser Industries, Inc., supra.*

[50] See *Super Thrift Markets, Inc. t/a Enola Super Thrift, supra.*

[51] *General Stencils, Inc., supra.* See also *Patsy Bee, Inc.*, 249 NLRB 976, 977 (1980); and *Milgo Industrial, Inc.*, 203 NLRB 1196 (1973).

[52] *Irving N. Rothkin, d/b/a Irv's Market*, 179 NLRB 832 (1969), enfd. 434 F.2d 1051 (6th Cir. 1970); *Textile Workers Union of America* v. *Darlington Manufacturing Co. et al.*, 380 U.S. 263 (1965).

[53] *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 611 at fn. 31.

under consideration[54]—I conclude that the Union is entitled to the issuance of a bargaining order.

In *Gissel Packing Co., supra*, the Supreme Court, in approving the Board's use of a bargaining order in the cases before it, depicted two situations in which such orders could appropriately be given. The first involves "exceptional cases" marked by unfair labor practices which are so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects with the result that a fair election is rendered impossible. The second situation involves "less extraordinary cases . . . which nonetheless still have the tendency to undermine majority strength and impede the election processes." In the latter situation, the Court stated a bargaining order should issue where the Board finds that "the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order."[55]

Respondent's unfair labor practices have unquestionably dissipated the Union's prior showing of substantial majority support among the employees and will continue to retard and stifle the enthusiasm for union activity displayed by many of them earlier in the Union's drive. Furthermore, in a unit of the limited size shown here—36 employees before the strike and only 26 out of approximately 42 having participated in the election some 9 months later—and given the fact that the principal actor was the owner of the business himself, it is highly likely that the lingering effects of Respondent's conduct will be particularly acute.[56] I therefore conclude that the Union's card majority provides a more reliable test of employee representation desires and better protects employee rights than would an election.[57] Among other considerations, it also seems clear that the Employer should not be allowed to benefit from the elapse of time and employee turnover resulting from the modification of Respondent's operations following the 4-month strike in 1980.[58]

Accordingly, I conclude that Respondent's conduct in refusing to recognize and bargain with the Union, while at the same time engaging in the most serious and flagrant acts intended to undermine and destroy it, violated Section 8(a)(5) and (1) of the Act, renders a fair election highly improbable, and independently requires the issuance of a bargaining order. The bargaining order shall be made effective from August 20, 1980, the date on which the Union made its initial demand and Respondent declined to recognize the Union, and 1 day after Respondent embarked on its systematic attempt to undermine the Union.[59]

Having also found that Respondent's failure to reinstate Lynch upon his unconditional offer to return to work violated Section 8(a)(3) and (1) of the Act, I shall also recommend that Respondent offer immediate and full reinstatement to him, without prejudice to his seniority or any other rights and privileges previously enjoyed, and that Respondent make him whole for any loss of earnings and other benefits he may have suffered by reason of Respondent's discrimination against him, computed in accordance with the formula stated in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977); see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time production and maintenance employees employed by Respondent at its Bronx, New York, facility, excluding all office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Beginning on August 11, 1980, the Union represented a majority of the employees in the above-described unit, and has been, and is, the exclusive representative of all said employees for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

5. By refusing to recognize and bargain collectively with the Union with respect to the employees in the appropriate unit described above on and after August 20, 1980, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By refusing to reinstate Paul Lynch upon the Union's unconditional offer to return to work at the conclusion of the strike made on his behalf because of his membership in and support of the Union and the strike called by the Union at Respondent's facility, and in order to discourage employees from joining the Union or engaging in the strike or other concerted activities, Respondent had engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

7. By the aforesaid refusal to reinstate Paul Lynch and refusing to bargain collectively and to recognize the Union, by threatening to close the plant if the Union became its employees' collective-bargaining representative, and by keeping under surveillance the union and protected concerted activities of its employees, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in

[54] *Irving Air Chute Company, Inc., Marathon Division*, 149 NLRB 627 (1964); *The Great Atlantic & Pacific Tea Company, Inc.*, 230 NLRB 766 (1977).

[55] 395 U.S. at 614–615.

[56] See *Philadelphia Ambulance Service, Inc.*, 238 NLRB 1070, 1071 (1978).

[57] Whether viewed as following the first or second category described by the *Gissel* Court, which I find it unnecessary to determine, the effects of Respondent's conduct is unlikely to be erased and a fair election ensured by the use of traditional remedies.

[58] See *Franks Bros. Company* v. *N.L.R.B.*, 321 U.S. 702 (1944).

[59] See *Trading Port, Inc.*, 219 NLRB 298, 301 (1975).

the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondent has not engaged in any unfair labor practices not specifically found herein; specifically Respondent has not violated the Act by refusing to reinstate Antonio Maldonado upon the Union's unconditional offer to return to work at the conclusion of the strike made on his behalf.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

## ORDER[60]

The Respondent, Arthur Briggs, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening to close the plant if Knitgoods Workers' Union, Local 155, I.L.G.W.U., AFL-CIO, becomes its employees' collective-bargaining representative, and keeping under surveillance the Union and protected concerted activities of its employees.

(b) Discouraging membership in Knitgoods Workers' Union, Local 155, I.L.G.W.U., AFL-CIO, or in any other labor organization, by refusing to reinstate strikers, upon their unconditional request, to existing vacancies with full seniority rights and privileges.

(c) Refusing to recognize and bargain in good faith with the aforementioned Union as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees employed by the Respondent at its Bronx, New York, facility, excluding all office clerical employees, guards and supervisors as defined in the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Paul Lynch immediate and full reinstatement to his former or substantially equivalent position of employment, without prejudice to his seniority or any other rights and privileges previously enjoyed, and make him whole for any loss of wages which he may have suffered by reason of the discrimination against him, in the manner set forth above in the section dealing with the remedy.

(b) Recognize, effective from the date beginning August 20, 1980, and, upon request, bargain collectively and in good faith with Knitgoods Workers' Union, Local 155, I.L.G.W.U., AFL-CIO, as the exclusive representative of all employees in the appropriate unit described above, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Bronx, New York, place of business, in English, Italian, and Spanish copies of the attached notice marked "Appendix."[61] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the consolidated complaint in Cases 2-CA-17519, 2-CA-17825, and 2-CA-18066 be dismissed as to those allegations not specifically found to be violative of the Act.

IT IS FURTHER RECOMMENDED in Case 2-RC-18849 that the Objections to the Election 1, 2, 4, 5, and 7 relating to improper surveillance shortly before the election, and Objection 8 relating to the refusal to reinstate employee Paul Lynch, be sustained, and the election held on May 5, 1981, be set aside.

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[60] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[61] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."